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PERSONAL INJURY CASE LAW REVIEW

In this article, the first of four on evidential issues relating to witnesses, IAN HUFFER discusses the legal principles surrounding failure to call witnesses.

This article, prompted partly by my own recent court experiences and partly by reading the recent High Court decision of Taylor v Chesterfield Royal Hospital NHS Foundation Trust [2019] EWHC 1048 (QB), considers the court's case law guidance on evidence in personal injury and clinical negligence claims and, in particular, the inferences that can properly be made from certain primary findings of fact.

On commencement, it quickly became apparent that the areas required to be covered (failure to call witnesses, witness recollection, inferences from documentation and dishonesty) were too extensive to be easily covered in one article. Whilst all arise in relation to the trial process and assessment of evidence, a proper understanding of the guidance ought to inform and shape practitioner's approach from risk assessment at the commencement of the case, through evidence gathering and witness proofing to the tactical decisions that are part of trial preparation.

1. Failure to Call Witnesses

The starting point is Lord Justice Brooks' four principles in Wisniewski v Central Manchester Health Authority [1998] 4 WLUK 14 which followed his review of previous cases which considered when it might be appropriate for a court to draw an adverse inference from the absence of a witness.

(1)In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2)If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3)There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4)If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

Any party considering whether the application of the principles might assist their case should appreciate:

(i) "Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. the court is entitled to draw adverse inferences" (Sales L.J. in Manzi v. King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882.

(ii) In determining whether there is a credible (though not necessarily wholly satisfactory) explanation capable of satisfying the court that an adverse inference should not be drawn, all the circumstances, procedurally and evidentially, need to be considered. A recent illustrative example where no inference was drawn was where the potential witness has no recollection at all of the events in question. (Welds v Yorkshire Ambulance Service NHS Trust [2016] EWHC 3325 (Q.B).

(iii) Because each case will be fact sensitive, it is not appropriate to treat the four principles set out by Brooke LJ in Wisniewski as if they were a statute or, as in Welds as establishing a rule that no adverse inference will ever be drawn where the witness who is not called says he or she has no recollection of events.

(iv) Taylor illustrates various factors or factual issues that in that case mitigated against adverse inferences being drawn against the hospital. They included the fact that the Defendant had not chosen to call the witness but had made efforts to secure his cooperation and attendance, the fact that the witness had no greater recollection than that recorded in a contemporaneous note, the existence of another witness present throughout the procedure and able to speak to the procedures in place and the fact that the Claimant had to opportunity to serve a witness summons and did not do so.

Whilst the number of cases where a party might want to raise arguments of adverse inference from the silence or non-attendance of a witness available to the other party might be relatively few, they are not limited to clinical negligence claims or to issues of liability. Circumstances where it could arise are quite common in personal injury litigation, obvious examples being family member witnesses in a road traffic collision and work colleagues in an employee liability case. The non attending witness may have material evidence on causation or a head of loss.

Advisors need to remain alive both to the potential in undermining case of other party but anticipating when it might be utilised against their own client. If consideration is being given to raising it offensively, my advice would be to try and raise it as early as possible in the litigation or pre-litigation process whether in correspondence or in the directions questionnaire.

If raised late in the day, the greater the chance of there being a good reason for a witness not being able to attend trial.

It may also be appropriate (arguably more appropriate, as you are inviting the court to draw a factual inference) to plead it expressly in the Defence or Reply.

Ian Huffer is a member of the Civil and Personal Injury Department dealing in all areas of Personal Injury litigation including high value claims, road traffic and industrial accidents, industrial disease claims and clinical negligence.

For further information please contact:

civil@18sjs.com

Of course, there is no property in a witness and there could be certain cases where it would not be inappropriate to proof and call the witness as part of your client's case.

The decision as to which witness to call and not call is but one issue in the overall evaluation of the evidential strengths and weaknesses of a client's case. This requires constant review of the evidential bases of their own and the opponent's cases and includes the likely reliability of the recollection of all witnesses, their honesty and their consistency with contemporaneous documentation—subjects which I consider in the next articles in this series.

IAN HUFFER
ihuffer@18sjs.com

18 St John Street
Manchester
M3 4EA
T • 0161 278 1800
F • 0161 278 8220
E • clerks@18sjs.com
@18stjohn
www.18sjs.com